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Guilty Plea In Fox News Leak Case Shows Why Espionage Act Prosecutions Are Inherently Unfair to Sources

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By [Trevor Timm](#) 



Former State Department official Stephen Kim announced today he will [plead guilty](#) to leaking classified information to Fox News journalist James Rosen and will serve 13 months in jail.

The case sparked controversy last year [when it was revealed](#) the Justice Department named Rosen a “co-conspirator” in court documents for essentially doing his job as a journalist. But a [largely ignored ruling](#) in Kim’s case may have far broader impact on how sources interact with journalists in the future.

In Espionage Act cases involving sources or whistleblowers, defendants naturally want to explain to a judge or jury that the information they may have given to journalists (and the American public) didn’t harm US national security. The bar for this was already too low; in the past, the government didn’t have to

show *actual* harm, but at least they had to show the information could *potentially* harm national security. The judge in Kim's case ruled the government didn't even need to do that.

As secrecy expert Steven [Aftergood reported at the time](#):

“ Judge Colleen Kollar-Kotelly [ruled](#) that the prosecution in the pending case of former State Department contractor Stephen Kim **need not show that the information he allegedly leaked could damage U.S. national security or benefit a foreign power, even potentially**. Her opinion was a departure from a 30-year-old ruling in the case of *U.S. v. Morison*, which held that the government must show that the leak was potentially damaging to the U.S. or beneficial to an adversary. (emphasis ours) ”

This means that it doesn't matter if the information leaked by Kim was properly classified, or if it should have been classified at all. Kim could not argue the information he gave to Rosen may have been innocuous. The ruling also gives the government carte blanche power to classify whatever it wants—including waste, abuse, and crimes—and keep it secret under the threat of prosecution of anyone who could potentially reveal it. As the defense [argued at the time](#), this ruling turns the Espionage Act into an Official Secrets Act, which Congress has continually refused to enact over the last century.

Because of this ruling, and other rulings in Espionage Act cases that bar defendants from explaining their intent to inform the American public to a jury, Kim likely had no choice to plead guilty. This is also why if Edward Snowden came back to the US he quite literally [cannot receive a fair trial](#): he would be [legally barred from making his case](#) in court.

The Kim case yet another example of the broken nature of how the government deals with leaks, in which the Justice Department has complete discretion to ignore the leaks they like, and prosecute the leaks they don't like. Kim's lawyer [Abbe Lowell made this point](#) eloquently in his statement today:

“ Stephen’s case demonstrates that our system for prosecuting leaks in this country is broken and terribly unfair. Lower-level employees like Mr. Kim are prosecuted because they are easier targets or often lack the resources or political connections to fight back. High-level employees leak classified information to forward their agenda or to make an administration look good with impunity. In fact, in this case, news reports from the same day demonstrate that Stephen was not the only government employee discussing the topic at issue. Stephen may have told the reporter what the reporter already knew from others, but Stephen was the only one charged.

“Leak” cases are prosecuted under the Espionage Act, a 100-year-old law with crushing penalties that was never intended to apply to conversations between a government employee and a news reporter. The Act and its penalties are designed to punish traitors and spies – not State Department analysts answering questions from the media about their area of expertise. Stephen faced more than a decade in jail for the type of public discussion of foreign policy issues that ought to be encouraged. This Administration and Congress should address these problems, as they undermine the basic fairness of our criminal justice system.

”

It’s clear the Espionage Act is inherently unfair to sources and whistleblowers. As Congress debates NSA reform, they should also be considering repealing the Espionage Act once and for all.

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